Filed 2/24/09 In re A.N. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.N., a Person Coming Under the Juvenile Court Law.	B206726 (Los Angeles County Super. Ct. No. CK70685)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. H.N., Defendant and Respondent.	

APPEAL from an order (dismissal of Welf. & Inst. Code, § 300 petition) of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Affirmed.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Appellant.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Defendant and Respondent.

INTRODUCTION

The juvenile court declared eight-year old A.N. to be a dependent of the court. In so doing, the juvenile court sustained the charging petition's allegations against A.N.'s mother but dismissed them as to A.N.'s father. This appeal, prosecuted by the Los Angeles County Department of Children and Family Services (Department), challenges only the trial court's dismissal of the allegations against A.N.'s father. We conclude that substantial evidence supports the trial court's ruling and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A.N. was born in December 1999. When A.N. was conceived, her mother T.T. (Mother) was only 14 years old while her father H.N. (Father) was 31 years old. According to Mother, "the sex [between her and Father] was consensual." Mother's parents contacted law enforcement to press statutory rape charges (Pen. Code, § 261.5). Father eventually pled guilty to four counts of committing lewd acts upon a child 14 or 15 years old (Pen. Code, § 288, subd. (c)(1)). Father was placed on probation, received credit for time served and registered as a sex offender. Before the dependency proceeding commenced in 2007, Father had been involved with A.N. only during the first year of her life.

A.N. came to Department's attention in November 2007. An anonymous individual reported that A.N. was the victim of physical and emotional abuse by Mother. Department investigated. It determined that A.N. is developmentally disabled. Department detained A.N., placing her with her maternal grandmother.

Department filed a section 300[1] petition containing allegations against both Mother and Father. We omit discussion of the specific allegations about Mother

[1] All undesignated statutory references are to the Welfare and Institutions Code.

because, although the petition was sustained as to her, she is not a party to this appeal.[2] In regard to Father, the petition relied upon his convictions for lewd acts upon a child and his status as a registered sex offender to support two allegations. The first allegation was made pursuant to subdivision (b) of section 300, the failure to protect provision. The second allegation was made pursuant to subdivision (d), the child at substantial risk of sexual abuse provision.

Four months elapsed between the filing of the section 300 petition and the hearing regarding the allegations about Father. During that period, Father was present at the court hearings, regularly visited A.N., and began to attend parenting classes.

Prior to Father's adjudication hearing, Department submitted a review report indicating that Father had met with the social worker. As to his lack of prior contact with A.N., Father explained: "I have not been involved with them [Mother and A.N.] for the past 7 years. The first year that [A.N.] was born, I did see her, I helped as much as I can, but then we lost contact. [Mother] was still under age and I was being charged with 6 counts of lewd and lascivious acts, so I stayed away." In regard to the future, Father stated "that he would like to interact and have a relationship with [A.N.]. [He] acknowledge[d] that he has been absent from her life due to the criminal charges he had pending [because of his sexual relationship with Mother]. Father stated that he is currently in the process of enrolling in parenting education courses to assist him with the establishment of building a

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[2] In February 2008, the court sustained two of the petition's allegations made against Mother, declared A.N. a dependent child of the juvenile court, removed A.N. from Mother's custody, and directed Department to provide reunification services to Mother. The court set a review hearing of Mother's status for August 4, 2008. The record does not reflect the outcome of that hearing.

relationship with his child and have more knowledge [about A.N.'s] special needs. Father stated that he would like services with his child and will participate in any court services as needed."

Department's report attached a copy of Father's criminal history. In addition to the convictions arising from his sexual conduct with Mother, Father had four misdemeanor convictions and one felony conviction. The misdemeanors consisted of three convictions of driving without a license[3] suffered in June 1994, February 1995, and April 1999 and one conviction of hit and run driving with property damage[4] suffered in November 1997. The felony conviction, suffered in November 1999, was for possession of cocaine base for sale.[5]

At Father's adjudication hearing, Department asked the trial court to sustain the section 300, subdivision (d) allegation. (Department did not address the subd. (b) allegation.) Department argued that A.N. was at substantial risk of being sexually abused because Father had been convicted of committing lewd acts upon Mother when she was 14 or 15 years old. Department argued: "[A.N.] is eight years old, which puts her close to the age or approaching the age of the mother's age at the time of the father's conduct." In addition, Department urged: "With respect to the time that has elapsed between the father's conduct and today's date, if the court is looking at the issue of risk and a nexus of risk between the conduct and today's present date, father is a registered sex offender. He is required to follow regulations by the criminal court in the State of California to remain a

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[3] Vehicle Code section 14601.1, subdivision (a).

[4] Vehicle Code section 20002, subdivision (a).

[5] Health and Safety Code section 11351.5.

registered sex offender." Department indicated that if the trial court sustained the petition, it would offer Father reunification services.

Father requested dismissal of both allegations in the section 300 petition. He argued: "The petition is referring to what happened over eight years ago. Since then, [Father] has raised a family on his own and has even sent one through college. Likewise, he would like to take responsibility for [A.N.] and provide the care she needs as she's a special needs child. [¶] He has not got into trouble with the law since this incident. There's nothing in the court file that shows a current danger or a substantial risk to the safety of [A.N.]. [¶] [Father] has never harmed the child. In fact, Mother is comfortable with him visiting her. . . . [T]he petition refers to what happened a long time ago and not a present danger."

A.N.'s attorney joined in Father's argument. She stated that the convictions were "too remote in time" and that Department had "failed to show . . . any risk to [A.N.]" or that Father had "failed to comply with the terms of his registration." She concluded: "There is no evidence that just because Father had a sexual relationship with a minor that he would have a sexual relationship with his own child."

The trial court dismissed the petition's two allegations against Father. It explained:

> "The court finds, one, that the father has been in compliance [with the court orders made up to this point], and *there's no evidence that he poses a risk to [A.N.] at this time.*
>
> "*The court finds that the allegations regarding her birth are remote in time*, and the fact that I realize that the report indicates that the sexual relationship was consensual, it is still, because of [Mother's] age, considered sexual abuse under the code.
>
> "However, there's no indication that because of that incident, that [Father] has at any time subsequent to that incident engaged in

> any behavior that would have criminally subjected him to criminal prosecution. *There's no indication there's been any inappropriate behavior with respect to his daughter*, which is the result of the earlier incident and for which we are currently here.
>
> "*The court does not see a nexus between the fact that he has to statutorily register and the fact that there is any indication that there would be a substantial risk that [A.N.] would suffer as a result of his statutory status*. And for that reason, the court is dismissing the two remaining counts that relate to [Father]." (Italics added.)

A.N. remained a dependent of the juvenile court. The court ordered continued placement of A.N. with her maternal grandmother and monitored visitation for A.N. and Father. When Father's attorney inquired about reunification services, the court responded: "He doesn't need them. . . . The case was dismissed as to him." Department did not object to any of the court's orders or statements.

DISCUSSION

Section 300 empowers the juvenile court to adjudge a child a dependent of the court if it finds, among other things, that there is a substantial risk that a parent's conduct endangers the child and places the child at risk of physical and emotional harm or sexual abuse. It is Department's burden to prove by a preponderance of the evidence the predicate facts. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

Here, the trial court found that Department had met its burden to prove that Mother's conduct created a substantial risk of harm to A.N. and, on that basis, adjudged A.N. a dependent of the court. However, the trial court found that Department had failed to carry its burden in proving its allegations about the risk created by Father's conduct. In considering Department's appellate challenge to

that latter ruling, "we must uphold the [trial] court's findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent [here, Father] and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value. [Citation.]" (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.)

Department claimed that there was a substantial risk that Father would sexually abuse A.N. To support this allegation, Department pointed merely to Father's convictions arising out of his sexual involvement with A.N.'s mother and Father's status as a registered sex offender. Department offered no other evidence to support its theory. In specific, there was no evidence that during the first year of A.N.'s life in which Father had contact with her he sexually abused her; that after his sexual relationship with Mother had ended, Father had any sexual relationship with a minor or sexually abused any minor (relative or non-relative); or that Father had engaged in any inappropriate behavior with A.N. since the dependency proceeding had begun. On this record, the trial court could reasonably conclude that Department had failed to meet its burden of establishing that there was a substantial risk that Father would sexually abuse A.N.

Department's contrary arguments are not persuasive.

Department's first argues that "there was no evidence of 'reasonable, credible and of solid value,' to justify the juvenile court's decision to dismiss the petition as to father." To a large extent, this argument improperly asks us to reweigh the evidence. We cannot and will not do that. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

Department also suggests that the trial court's order should be reversed because it "failed to consider father's constant troubles with the law [e.g., his prior convictions]." The record does not support this claim. Father's criminal history

was attached to Department's report so presumably the trial court reviewed it. (Evid. Code, § 664.) Although Department presented the criminal history in its report, it failed to mention (let alone rely upon) any of the convictions (other than those for lewd acts upon a child) when it argued that the petition should be sustained. The logical inference is that the trial court concluded (as Department apparently did when it failed to rely upon Father's history in its argument to the trial court) that the criminal history was not probative on the question whether there was a substantial risk Father would sexually abuse A.N. We will not second guess the trial court's implicit finding on this point.

Next, Department relies upon subdivision (d) of section 355.1 to seek reversal of the trial court's ruling. The statute provides, in pertinent part:

> "(d) Where the court finds that . . . a parent . . . [of] a minor who is currently the subject of the petition filed under Section 300 . . . has been previously convicted of sexual abuse as defined in Section 11165.1 of the Penal Code [or] is required, as the result of a felony conviction, to register as a sex offender pursuant to Section 290 of the Penal Code, that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence."

On its face, the statutory presumption applies to Father for two reasons: (1) Penal Code section 11165.1 includes within its definition of sexual abuse the commission of lewd or lascivious acts upon a child (Pen. Code, § 288, subd. (c)(1)); and (2) Father is a registered sex offender. That Father is a noncustodial parent does not preclude use of the presumption. (*In re John S.* (2001) 88 Cal.App.4th 1140, 1145.) From this context, Department argues that Father failed to rebut the prima facie showing created by presumption because he "provided no

evidence to the juvenile court [but, instead] relied only on the reports filed by [Department]." We are not persuaded.

To begin, Department failed to raise section 355.1 in the trial court. Its report filed immediately prior to Father's adjudication hearing made no mention of the statutory presumption. Further, during the extensive argument offered at the hearing, Department did not bring the provision to the trial court's attention. Department's failure to rely upon the statute below constitutes a forfeiture of its right to raise it for the first time on appeal. To permit Department to do so would be unfair to both the trial judge and to Father who have been denied an opportunity to address the presumption. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502.)

In any event, Department's argument on the merits falls short. Section 355.1 creates a presumption affecting the burden of producing evidence. "A presumption affecting the burden of producing evidence requires the ultimate fact [here, a substantial risk exists that Father will sexually abuse A.N.] to be found from proof of the predicate facts [here, Father's conviction of lewd acts upon a child and his registration as a sex offender] in the absence of other evidence. If contrary evidence is introduced then the presumption has no further effect and the matter must be determined on the evidence presented. (Evid. Code, § 604.)" (*In re Heather B.* (1992) 9 Cal.App.4th 535, 561.)[6] In this case, contrary evidence was introduced. Father's unlawful sexual conduct with Mother had occurred nine years earlier. Since then, he had committed no other act of sexual abuse. Once the

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[6] Evidence Code section 604 provides: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

dependency proceeding began, he visited with A.N. (with no inappropriate interactions) and enrolled in parenting classes.[7] "[T]he presumption disappears where, as here, it is met with contradictory evidence." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421.) Once the presumption disappeared, the trial court could properly determine (as it did), that based upon a consideration of all the evidence presented, Department had failed to establish that A.N. was at substantial risk of abuse from Father.

In a completely different vein, Department argues that the trial court erred in failing to sustain the petition under subdivision (b) of section 300 "based on the harm already done to [A.N.] due to father's abandonment, neglect and abject failure to protect." This argument need not detain us. This was not the basis of Department's subdivision (b) allegation in the trial court. Department, instead,

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[7] We reject Department's suggestion that it matters that the contrary evidence was found in Department's report as opposed to having been presented by Father himself. Department's reliance upon *In re John S., supra,* 88 Cal.App.4th 1140 is misplaced. In that case, the Department had relied upon section 355.1 in the trial court because the father was a registered sex offender. The father claimed that the presumption did not apply to him because he did not have custody of or provide care for his son. The trial court disagreed and applied the statutory presumption. The father presented no evidence and did not seek a continuance to do so. The trial court sustained the section 300 petition. (*Id*. at p. 1143.)

On appeal, the father's only contention was that the trial court erred in concluding that section 355.1 applied to him because he was a noncustodial parent. The appellate court, relying upon the statute's legislative history, disagreed. (*Id*. at pp. 1144-1145.) The last paragraph of its opinion contains the language (which we italicize) upon which Department now relies. It reads: "We emphasize that the presumption in the statute is not conclusive and affects only the burden of producing evidence. Appellant was free to present evidence that his status as a registered sex offender did not place the minor at substantial risk of abuse or neglect. *Appellant did not do so, instead relying only upon the evidence in the social worker's report and reasonable inferences therefrom to oppose an adverse jurisdictional finding*." (*Id*. at pp. 1145-1146, italics added.) In context, the italicized statement means only that the information in Department's report *in that case* was insufficient to defeat application of the presumption so that the father's failure to present contrary evidence required the appellate court to affirm the trial court's ruling.

relied solely upon Father's sexual abuse convictions and status as a registered sex offender to allege that there was a substantial risk that A.N. would suffer serious physical harm because of his inability to adequately protect her. Further, at the hearing Department never even addressed the subdivision (b) allegation. The trial court therefore cannot be faulted for failing to sustain the petition on a basis never alleged and never argued.

Lastly, Department urges that the trial court erred because "it failed to make disposition orders as to Father." (Capitalization and boldface omitted.) Department's failure to raise this point below constitutes a forfeiture of its right to raise it on appeal. (See, e.g., *In re David H.* (2008) 165 Cal.App.4th 1626, 1640.)

DISPOSITION

The order appealed from (dismissal of section 300 petition as to respondent H.N.) is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.